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Nos. 99-1864 and 99-1865

In the Supreme Court of the United States

JAMES B. HUNT, JR., GOVERNOR OF NORTH CAROLINA, ET AL., APPELLANTS

v.

MARTIN CROMARTIE, ET AL.

ALFRED SMALLWOOD, ET AL., APPELLANTS

v.

MARTIN CROMARTIE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

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QUESTION PRESENTED

The United States will address the following question:

Whether the district court applied the correct legal standards in finding that race was the predominant factor in the drawing of District 12 of North Carolina's 1997 congressional redistricting plan.

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INTEREST OF THE UNITED STATES

This case concerns a district court's finding that a state election districting plan was drawn predominantly on the basis of race, in violation of the Equal Protection Clause of the Fourteenth Amendment. The United States enforces Sections 2 and 5 of the Voting Rights Act of 1965 (42 U.S.C. 1973, 1973c), which require, in part, that States and political subdivisions not engage in voting practices that deny citizens an equal opportunity to elect representatives of their choice on account of their race. Those statutes sometimes require States to take the racial consequences of their districting decisions into account. The United States has an interest in ensuring that States have reasonable leeway to

design districts that comply with both the Voting Rights Act and the Equal Protection Clause. The United States has participated in all three prior appeals in related litigation. The United States was a party-defendant in *Shaw* v. *Reno*, 509 U.S. 630 (1993), and filed briefs as *amicus curiae* in *Shaw* v. *Hunt*, 517 U.S. 899 (1996), and in *Hunt* v. *Cromartie*, 526 U.S. 541 (1999).

STATEMENT

1. In *Shaw* v. *Hunt*, 517 U.S. 899 (1996) (*Shaw II*), this Court struck down North Carolina's 1992 congressional districting plan under the Equal Protection Clause of the Fourteenth Amendment. The Court held that District 12 in that plan had been drawn predominantly on the basis of race, *id.* at 907, and that it did not satisfy strict scrutiny, *id.* at 910-918.

After this Court's decision, the North Carolina General Assembly attempted to enact a new districting plan. The state Senate had a Democratic majority and the House had a Republican majority. State Senator Roy A. Cooper, III, and State Representative W. Edwin McMahan, the chairmen of the Senate and House redistricting committees, provided affidavits and testimony detailing the goals and purposes of the committees. J.S. App. 81a-87a; J.A. 179-230 (Cooper); J.S. App. 137a-154a; J.A. 231-244 (McMahan). Among the avowed goals of the committees were "curing the constitutional defects of the 1992 Plan by assuring that race was not the predominant factor in the new plan" and "drawing the plan to maintain the existing partisan balance." J.S. App. 11a. To achieve that partisan goal, "the redistricting committees drew the new plan (1) to avoid placing two incumbents in the same district and (2) to preserve the partisan core of the existing districts to the extent consistent with the goal of curing the defects in the old plan." *Ibid.*

District 12 in the 1997 Plan is different from the district found unconstitutional in *Shaw II* in important respects. As

this Court noted in its prior decision in this case, *Hunt* v. *Cromartie* (*Hunt I*), 526 U.S. 541, 544 (1999), District 12 splits six counties, as opposed to ten in the unconstitutional plan. The distance between its farthest points has been reduced from 160 miles to 95 miles. *Ibid.* African-Americans are no longer a majority in the district, constituting approximately 43% of its voting age population, 46% of registered voters, and 47% of its population. *Ibid.* District 12 is also fully contiguous and, unlike the unconstitutional District 12 in the 1992 plan, it does not employ artificial devices such as "crossovers" to achieve contiguity. J.S. App. 83a.

The 1997 Plan was enacted by the legislature on March 31, 1997, despite an earlier belief by many that the party division between the two houses of the legislature would make such agreement impossible. J.S. App. 2a, 82a, 138a; J.A. 240. Twelve of the 17 African-American members of North Carolina's House of Representatives voted against the plan. J.S. App. 140a.

2. a. Appellees filed an amended complaint alleging that District 12 under the 1997 Plan is, like its predecessor, an unconstitutional gerrymander. See *Hunt I*, 526 U.S. at 544. The parties filed competing motions for summary judgment and, in April 1998, the district court, by a 2-1 majority, granted appellees' motion. *Id.* at 545; see J.S. App. 243a-282a.

b. On May 17, 1999, this Court in *Hunt I* unanimously reversed the order granting summary judgment to appellees. The Court noted that "[t]he task of assessing a jurisdiction's motivation * * * is an inherently complex endeavor" and that it "requir[es] the trial court to perform a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 526 U.S. at 546 (citation omitted). Assessing the summary judgment record, the Court noted that appellees had offered "circumstantial" evidence consisting of geographic and demographic data, *id.* at 547, which, "[v]iewed in toto, * * * tends to support an

inference that the State drew its district lines with an impermissible racial motive—even though they presented no direct evidence of intent." *Id.* at 548-549. The Court also noted, however, that appellants had produced testimony by the legislators who drew the plan that their intent was "to make District 12 a strong Democratic district," and what the Court described as "[m]ore important" expert testimony examining the demographics and the entire boundary of the district. *Id.* at 549. That testimony tended to show "a high correlation between race and party preference," *id.* at 552, because "in precincts with high black representation, there is a correspondingly high tendency for voters to favor the Democratic Party" and vice versa, *id.* at 550. The expert, Dr. David W. Peterson, concluded that "the data as a whole supported a political explanation at least as well as, and somewhat better than, a racial explanation" for the configuration of District 12. *Ibid.*

The Court noted that a political explanation for District 12 would make the district constitutional, since "a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were conscious of that fact." 526 U.S. at 551. To reject that political explanation, the district court had necessarily "either credited appellees' asserted inferences over those advanced and supported by appellants or did not give appellants the inference they were due." *Id.* at 552. In either event, "it was error in this case for the District Court to resolve the disputed fact of motivation at the summary judgment stage." *Ibid.*

3. On remand, the three-judge district court held a three-day trial. On March 7, 2000, the court ruled by a 2-1 margin that District 12 "continues to be unconstitutional." J.S. App. 35a.

a. The majority initially repeated, virtually verbatim, many of the same facts regarding the racial composition, party registration, and statistical measures of compactness

that it had relied on in granting summary judgment to appellees. That evidence tended to show that cities and counties were divided such that the portions within District 12 had substantially higher percentages of African-Americans than the portions outside District 12, see J.S. App. 12a-14a, and that the boundary of District 12 excluded certain precincts in which 54-69% of the voters had registered as Democrats, see *id.* at 13a-14a. It also showed that District 12 scored relatively low on statistical measures of compactness. *Id.* at 15a-17a. Compare J.S. App. 247a-253a (district court opinion at summary judgment stage).

The majority also referred to evidence presented by plaintiffs' expert, Dr. Ronald Weber. According to the court, Dr. Weber "showed time and again how race trumped party affiliation in the construction of the 12th District and how political explanations utterly failed to explain the composition of the district." J.S. App. 26a. The majority also stated that Dr. Weber had "presented a convincing critique" of the "boundary segment" analysis presented by the State's expert, Dr. David Peterson, and discussed by this Court in its opinion in *Hunt I*, and that Dr. Weber had found that Dr. Peterson's study "'has not been appropriately done,' and was therefore 'unreliable' and not relevant." *Id.* at 27a. The majority did not itself specify the particular respects in which Dr. Peterson's analysis was deficient.

The majority finally referred to two other items of evidence to support its conclusion that race, and not politics, was the predominant factor underlying the creation of District 12. First, the majority referred to the testimony of Senator Cooper. The majority stated that "[t]he conclusion that race predominated was * * * bolstered by" an allusion by Senator Cooper to a desire to achieve "racial and partisan balance" as factors underlying the redistricting plan. J.S. App. 27a. The majority found "simply not credible" Senator Cooper's contention that "he did not mean the term 'racial balance' to refer to the maintenance of a ten-two balance be-

tween whites and African-Americans." *Ibid.* Second, the court referred to an e-mail to Senator Cooper that had been written by Gerry Cohen, the legislative employee who had been responsible for technical aspects of drawing the 1997 and earlier state plans. See *id.* at 8a. The e-mail discussed the racial composition of a different district—District 1—and then added that "I [Cohen] have moved Greensboro Black community into the 12th, and now need to take [a]bout 60,000 out of the 12th. I await your direction on this." *Ibid.*; see J.A. 369 (full text of e-mail). The majority stated that the e-mail "clearly demonstrates that the chief architects of the 1997 Plan had evolved a methodology for segregating voters by race, and that they had applied this method to the 12th District." J.S. App. 27a.

The majority concluded that the legislature had "eschewed traditional districting criteria such as contiguity, geographical integrity, community of interest, and compactness in redrawing the District," but instead had "utilized race as the predominant factor in drawing the District." J.S. App. 29a. The court entered an injunction against use of District 12 in this year's elections. *Id.* at 35a.[1]

b. Judge Thornburg dissented from the panel's holding that District 12 is an unconstitutional racial gerrymander. J.S. App. 37a-68a. In his view, appellees—who had the burden of proving that race was the predominant factor—had "failed to carry their burden through either direct or circumstantial evidence." *Id.* at 45a. He stated that the State had "produced ample and convincing evidence which

[1] The district court also held that District 1 was subject to strict scrutiny, but it found that the State had satisfied that standard. J.S. App. 30a-35a. Appellees did not perfect their appeal from that ruling, and the district court granted appellants' motion to dismiss appellees' appeal on August 3, 2000 (Docket No. 178). Accordingly, although the district court's ruling that District 12 is unconstitutional is now before this Court, the district court's ruling that District 1 is constitutional is no longer at issue, and will not be further addressed herein.

demonstrates that political concerns such as existing constituents, incumbency, voter performance, commonality of interests, and contiguity, not racial motivations, dominated the process surrounding the creation and adoption of the 1997 redistricting plan." *Id.* at 45a-46a. He noted that the 1997 Plan's drafters "recognized the necessity of creating a plan which would garner the support of both parties and both houses" by "protect[ing] incumbents and thereby maintain[ing] the then existing 6-6 partisan split amongst North Carolina's congressional delegation." *Id.* at 46a. Since District 12 had a Democratic incumbent, "common sense as well as political experience dictated ascertaining the strongest voter performing Democratic precincts in the urban Piedmont Crescent." *Id.* at 47a. The fact "[t]hat many of those strong Democratic performing precincts were majority African-American, and that the General Assembly leaders were aware of that fact, is not a constitutional violation." *Ibid.*

Judge Thornburg addressed Dr. Weber's testimony that District 12 was drawn on a predominantly racial, and not political, basis, because the District failed to include some Democratic precincts that had relatively low African-American populations. Judge Thornburg noted that "there is no dispute that every one of the majority African-American precincts included in the Twelfth District are among the highest, if not the highest, Democratic performing districts in that geographic region." J.S. App. 50a. He noted that to include other well-performing Democratic precincts identified by Dr. Weber would have meant excluding "the *highest* performing Democratic precincts." *Ibid.* He also explained that "few of the strong Democratic precincts to which Dr. Weber referred could have easily been included in the Twelfth District" because few of them "actually abutted" the District. *Id.* at 50a n.21. Judge Thornburg also noted Dr. Weber's testimony that he had "considered no hypothesis other than race as the legislature's predominant motive" be-

cause he had believed, mistakenly, "that the person drawing North Carolina's districts could only see racial data" on his computer screen. *Id.* at 51a. Finally, Judge Thornburg noted that Dr. Weber had also "specifically failed to inquire about real world political or partisan factors which might have influenced the process." *Ibid.*

With respect to the Cooper-Cohen e-mail, Judge Thornburg explained that it "does little more than reinforce what is already known, and what is not constitutionally impermissible: North Carolina's legislative leaders were conscious of race, aware of racial percentages, on notice of the potential constitutional implications of their actions, and generally very concerned with these and every other political and partisan consideration which affected whether or not the redistricting plan would pass." J.S. App. 48a n.18. Those facts "contribute little to [appellees'] efforts to show that racial motives *predominated.*" *Ibid.*

4. On March 16, 2000, this Court entered an order staying the district court's injunction. 120 S. Ct. 1415.

SUMMARY OF ARGUMENT

This case presents the Court with what is likely to be its final opportunity to clarify the legal standards governing a racial gerrymandering claim before state legislatures begin the redistricting process triggered by the decennial census. Both in the *Shaw* context and elsewhere, this Court has frequently emphasized the extraordinary sensitivity of redistricting and high costs of unnecessary federal court intrusion into the primary authority of the States in this area. For those reasons, it is crucial that the "predominant factor" test that governs a racial gerrymandering claim not be interpreted to give district courts a free-ranging license to substitute their judgments for those of state legislatures in the quintessentially political determination of how appropriately to draw electoral districts.

This Court's decisions have established that a district is subject to strict scrutiny when it is drawn with race as the predominant factor; the plaintiff must prove that traditional race-neutral districting principles were subordinated to race—not to some other factor—before strict scrutiny applies. As the Court has repeatedly explained, the "predominant factor" test is a demanding one. It does not license a district court to intrude in the core state function of redistricting merely because the State has drawn a district that is majority-minority or that has a higher minority population than neighboring districts. Nor does it permit a district court to intrude in state redistricting merely because racial considerations were *a* factor among others in drawing a particular district or in making some of the subsidiary districting decisions that go into a districting plan. Rather, a district court may intrude in districting in this context only if the State's dominant and controlling rationale was race.

Under that standard, the district court in this case erred in concluding that the predominant factor in drawing District 12 was racial. First, the district court relied substantially on evidence that was incompetent to distinguish between race and politics as a factor responsible for the configuration of District 12. The crucial and uncontroverted fact is that in North Carolina African-Americans reliably vote overwhelmingly—90% or more—for Democratic candidates. Accordingly, any district that, like District 12, is drawn to concentrate reliable Democratic voters will tend as well to concentrate African-American voters. The evidence on which the district court relied that District 12 is unusually shaped in a way that tends to correspond with race thus tends only to frame the question—whether the district was drawn with race or political motives as predominant—but not to answer it. The district court also relied on evidence showing that District 12 fails to include some precincts with high Democratic registration figures. But in a State like North Carolina, in which registered Democrats frequently

vote Republican, that evidence is entirely consistent with the legislature's professed desire to create a district that would be solidly Democratic on election day, and it provides no basis for doubting the State's professed political motive.

Second, the district court committed clear error in inferring from certain evidence presented by appellees' expert, Dr. Ronald Weber, that race was the predominant motive underlying District 12. For example, the district court relied on Dr. Weber's testimony that precincts that had voted for Democratic candidates in past elections were omitted from District 12. The evidence on which the court relied would have been sufficient to tend to disprove the State's partisan objective of creating District 12 as a solidly Democratic district only if appellees had shown that including the omitted precincts would have resulted in a District 12 with a higher overall Democratic voting strength. Omitting precincts with Democratic voting patterns in favor of precincts with even more solidly Democratic voting patterns is entirely consistent with the State's professed objective. It cannot support an inference of predominant racial motive.

Third, the district court, based in large part on the faulty inferences discussed above, inferred a predominant racial motive from statements by Senator Cooper and legislative employee Gerry Cohen. Insofar as the district court's inferences in this regard were based on its earlier errors, the court's conclusions should be disregarded. In any event, however, the inferences the district court drew from these statements showed at most that race was *a* factor underlying District 12. The district court thus failed to distinguish between a State's mere desire to achieve a racial objective in districting as one factor among others and the desire to achieve a racial objective as a predominant motive underlying District 12; only the latter is subject to strict scrutiny. Where there is as close a coincidence of race and politics as in this case, a district court may not conclude that race was the predominant factor based solely on isolated findings that

in particular respects the process or result of the State's districting shows that the State was aware of the racial consequences of its actions or that race was a factor; to do so would leave States that engaged in entirely constitutional districting at risk of a district court's inference that, because they had some racial knowledge or motivation, it must have been predominant.

ARGUMENT

I. THE PREDOMINANT FACTOR TEST REQUIRES A DISTRICT COURT TO ENGAGE IN A PARTICULARLY SENSITIVE INQUIRY INTO A STATE'S INTENT IN DRAWING A DISTRICT, AND IT REQUIRES PROOF NOT MERELY THAT RACE WAS A FACTOR IN DRAWING A DISTRICT, BUT THAT IT WAS THE PREDOMINANT FACTOR

A. A *Shaw* Claim Requires Proof That Race Was The State's "Predominant Factor"

In *Shaw* v. *Reno*, 509 U.S. 630 (1993) (*Shaw I*), this Court first recognized a claim for racial gerrymandering in violation of the Equal Protection Clause. In *Miller* v. *Johnson*, 515 U.S. 900 (1995), the Court articulated the governing standard: strict scrutiny is triggered only when "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines." *Id.* at 913. Race must thus be shown to be "*the predominant* factor motivating the legislature's [redistricting] decision." *Bush* v. *Vera*, 517 U.S. 952, 959 (1996) (plurality opinion) (emphasis in original); see also *Shaw* v. *Hunt*, 517 U.S. 899, 905 (1996) (*Shaw II*); *Lawyer* v. *Department of Justice*, 521 U.S. 567, 582 (1997); *Hunt* v. *Cromartie*, 526 U.S. 541, 547 (1999) (*Hunt I*).

The "predominant factor" test is not the same inquiry applicable "in cases of 'classifications based explicitly on

race,'" *Bush*, 517 U.S. at 958, or in cases in which facially neutral practices are challenged on the ground that race is a "motivating factor in the decision," *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977). A necessary consequence of the Court's holding that a district is subject to strict scrutiny only when race was the State's "predominant factor" in drawing it is that a *Shaw* claim is not made out when race is merely one of the motives or factors considered—but not the predominant one—in drawing the district. Indeed, the plurality in *Bush* made that point expressly, rejecting the view "that it suffices [in making out a *Shaw* claim] that racial considerations be *a* motivation for the drawing of a majority-minority district." *Bush*, 517 U.S. at 959 (emphasis in original). In short, "[s]trict scrutiny does not apply merely because redistricting is performed with consciousness of race," *id.* at 958, "[n]or * * * is the decision to create a majority-minority district objectionable in and of itself," *id.* at 962. As Justice O'Connor has explained, under the "predominant factor" test, "States may intentionally create majority-minority districts, and may otherwise take race into consideration, without coming under strict scrutiny." *Id.* at 993 (O'Connor, J., concurring).

B. The Predominant Factor Test Is A Demanding One

1. This Court has frequently noted, both in *Shaw* cases and in other redistricting cases, that "redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt." *Wise* v. *Lipscomb*, 437 U.S. 535, 539 (1978). Of course, federal courts serve a "customary and appropriate backstop role," *Bush*, 517 U.S. at 985, when a state redistricting plan "runs afoul of federal law," *Lawyer*, 521 U.S. at 577. But because "reapportionment is primarily the duty and responsibility of the State," *Chapman* v. *Meier*, 420 U.S. 1, 27 (1975), and is "a most difficult subject for legislatures," *Miller*, 515

U.S. at 915, "the States must have discretion to exercise the political judgment necessary to balance competing interests," *ibid.* "The task of redistricting is best left to state legislatures, elected by the people and as capable as the courts, if not more so, in balancing the myriad factors and traditions in legitimate districting policies." *Abrams* v. *Johnson*, 521 U.S. 74, 101 (1997). See also *Growe* v. *Emison*, 507 U.S. 25, 34 (1993). Because of the serious consequences of federal judicial intrusion into this most sensitive of state legislative tasks, "[t]he courts, in assessing the sufficiency of a challenge to a districting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus." *Miller*, 515 U.S. at 915-916. See also *id.* at 916 ("[T]he sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments * * * requires courts to exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race."); *id.* at 915 ("the good faith of a state legislature must be presumed").

2. The extraordinary sensitivity of the redistricting process, coupled with the high costs of undue federal court intrusion into that process, demands that a district court scrupulously observe the substantive requirements of the "predominant factor" test before finding a *Shaw* violation. In some cases, of course, "[t]he evidentiary inquiry is . . . relatively easy." *Miller*, 515 U.S. at 913. For example, "[i]n some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to 'segregat[e] . . . voters' on the basis of race." *Shaw I*, 509 U.S. at 646-647. Similarly, the redistricting record or the subsequent litigation may disclose the relevant State officials making clear that their "*overriding* purpose was * * * to create * * * congressional districts with effective black voting majorities." *Shaw II*, 517 U.S. at 906; *Miller*, 515 U.S. at 918 (State was "driven by its overriding desire to comply with

[racial] maximization demands"). These are mere examples; other facts can also demonstrate that race was the predominant factor in a particular case.

In other cases, it cannot so readily be inferred that race was the predominant factor. For example, when (as is true in this case) race correlates highly with partisan voting behavior, it is predictable that a State that wants to create a district whose borders tend to concentrate members of a particular political party will, as a byproduct, create a district whose borders tend to concentrate members of a particular race. If that alone were sufficient to support a finding that strict scrutiny applies (and that the district is unconstitutional absent a compelling interest), a State would have to forego its otherwise lawful option of forming districts on the basis of partisan choices. Indeed, it would have to do so only in one category of cases—where race correlates highly with partisan voting behavior. That contravenes the settled principles that "incumbency protection, at least in the limited form of 'avoiding contests between incumbent[s],' [is] a legitimate state goal," and that "political gerrymandering" should not be subjected to strict scrutiny. *Bush*, 517 U.S. at 964.[2]

Even if the State has taken race into account to some extent in drawing the district in such a case, that is still not sufficient to show that the "predominant factor" underlying the district is racial. As discussed above, strict scrutiny is not triggered where race is merely "*a* motivation," *Bush*, 517 U.S. at 959, in drawing a district; a *Shaw* claim requires proof that race was the *predominant* factor. Therefore,

[2] See *Bush*, 517 U.S. at 968 ("If the State's goal is otherwise constitutional political gerrymandering, it is free to use * * * political data * * * —precinct general election voting patterns, precinct primary voting patterns, and legislators' experience—to achieve that goal regardless of its awareness of its racial implications and regardless of the fact that it does so in the context of a majority-minority district.") (citations omitted).

where race and partisan voting behavior correlate highly, and a State draws a district with mixed political, racial, and other motivations, a district court may not merely seize on isolated evidence tending to show the State's racial motivation in drawing the district to conclude that race was the predominant factor. To permit that inference would paradoxically hamstring state legislatures in achieving their political objectives in any State where race correlates highly with partisan voting behavior. For even if a legislature paid no attention whatever to race, its politically motivated districting decisions would likely be susceptible to a racial interpretation. And if the State exercised its lawful authority to take race into account to some extent, it would inevitably risk the finding of predominant racial motive that was made here. That result would be inconsistent with bedrock principles recognizing that state legislatures—and not federal courts—have primary responsibility for the politically highly charged task of drawing districts, and that federal courts must be particularly cautious before intruding into state prerogatives in this area. To trigger strict scrutiny, the party challenging the district must satisfy the heavy burden of proving that "[r]ace was the criterion that, in the State's view, could not be compromised." *Shaw II*, 517 U.S. at 907.

Bush v. *Vera* illustrates these principles. The plurality in *Bush* initially noted findings "that the State substantially neglected traditional districting criteria such as compactness, that it was committed from the outset to creating majority-minority districts, and that it manipulated district lines to exploit unprecedentedly detailed racial data." 517 U.S. at 962. The plurality stated, however, merely that those factors "together weigh in favor of the application of strict scrutiny"—not that they required its application. *Ibid.* The plurality explained that it must therefore "consider what role other factors played in order to determine whether race predominated." *Id.* at 963. As the plurality explained,

"[b]ecause it is clear that race was not the only factor that motivated the legislature to draw irregular district lines, we must scrutinize each challenged district to determine whether the District Court's conclusion that race predominated over legitimate districting considerations, including incumbency, can be sustained." *Id.* at 965. Only after concluding that there was exceptionally strong evidence sufficient to show not merely that race was a factor, but that it was the *predominant* factor, did the plurality determine that the districts in question should be subject to strict scrutiny.[3] The same inquiry was required here.

II. THE DISTRICT COURT IMPROPERLY INFERRED A PREDOMINANT RACIAL MOTIVE IN THIS CASE

As this Court noted in its decision in *Hunt I*, the lines of District 12 correlate highly with race. District 12 contains portions of six counties; in each of them, the portion of the county within District 12 has a substantially higher African-American population than does the portion of the county outside District 12. See *Hunt I*, 526 U.S. at 548 & n.4. Moreover, the boundary lines of District 12 are irregular in shape. See *id.* at 547-548. Plaintiffs' claim has always been

[3] See *Bush*, 517 U.S. at 969 (evidence that the State itself explained the district "in exclusively racial terms"), 970 (evidence that "districting software * * * provided only racial data at the block-by-block level," and that district lines were in fact determined at that level), 970 (evidence of use of "race as a proxy"), 971 (evidence that shape of district was "far from the shape that would be necessary to maximize the Democratic vote in that area"), 972-973 ("intensive and pervasive use of race both as a proxy to protect the political fortunes of adjacent incumbents, and for its own sake in maximizing the minority population of District 30 regardless of traditional districting principles"), 975 ("racial demographics and voting patterns * * * belie[] any suggestion that party politics could explain" two adjoining districts, because "[t]he district lines correlate almost perfectly with race, while both districts are similarly solidly Democratic") (citation omitted).

that this evidence demonstrated that District 12 was an unconstitutional racial gerrymander.

As the Court explained in *Hunt I*, however, the State advanced a different explanation for the lines of District 12. At the time of the 1997 Plan, the North Carolina legislature was divided between Republicans and Democrats, with the Republicans in control of the House and the Democrats in control of the Senate. Similarly, the State's congressional delegation was evenly divided between six Democrats and six Republicans. The State contended that the legislators in charge of redistricting concluded that, in this situation, the only way to get a redistricting plan through the legislature would be to adopt a plan that maintained the six-six partisan split in the congressional delegation and that protected all of the incumbents. See J.S. App. 82a-83a, 138a-139a; J.A. 180-182, 235, 240-241. Because District 12 had a Democratic incumbent, the result was to craft District 12 in such a way as to solidify the Democratic vote there. Further, it is undisputed that 90% or more of African-Americans in North Carolina regularly vote Democratic. See, *e.g.*, J.A. 130 ("over 90 percent" in a series of studies); J.A. 139 ("95 to 97 percent"). Accordingly, the State contended that the correlation between the district lines and race was a mere by-product of the State's desire to create a solidly Democratic District 12; the result of the State's attempt to concentrate Democratic voters in the district was that the most reliable Democratic voters—African-Americans—tended to be included.[4]

[4] It is also significant that District 12—with a 43% African-American voting age population and a 47% total African-American population—is not a majority-minority district. As the Court explained in *Lawyer*, "[t]he fact that [the challenged district] is not a majority black district * * * supports the * * * finding that the district is not a 'safe' one for black-preferred candidates, but one that offers to any candidate, without regard to race, the opportunity to seek and be elected to office." 521 U.S. at 581 (internal quotation marks omitted).

In short, this was a "mixed motive" case, like *Bush* v. *Vera*. See 517 U.S. at 959. On remand, what remained for the district court was to determine whether plaintiffs could carry their burden at trial of proving that, as between the two motives, race—and not the kinds of partisan considerations urged by the State—was the predominant factor underlying the District. The district court's conclusion that plaintiffs had carried that burden was fatally defective, for three reasons.

A. The District Court Relied Substantially On Evidence That Was Incompetent To Distinguish Between Race And Politics As A Factor In Drawing District 12

Much of the district court's opinion is an almost verbatim repetition of the court's previous opinion on summary judgment. Compare J.S. App. 10a-17a (final judgment opinion), 23a-26a (same), 28a-30a (same) with J.S. App. 246a-253a (summary judgment opinion), 258a-261a (same), 262a-263a (same). The portions of the majority's opinion repeated from its summary judgment opinion recite findings that District 12's boundaries correspond with race; that District 12 splits each of the cities and counties it enters on lines that correspond with race; and that District 12 is unusually shaped under statistical and other measures of compactness.

The facts recited by the district court are accurate, and in an appropriate case they could provide substantial evidence of a predominant racial motive. In the circumstances of this mixed motive case, however, the evidence recited above only frames the question; it does nothing to provide an answer. It merely shows that there must have been *some* motive behind this unusually shaped district and that that motive *might* have been race. But the State produced substantial evidence showing that its predominant motives were political, and that political motives would result in a district with the same unusual shape and the same racial composition. The evidence that District 12's boundaries tend to correspond with race does nothing to distinguish between the two motives and to determine which was the predominant one—the primary issue that remained open for trial after this Court's remand.

Nor is that inquiry advanced by the fact, noted by the district court in its summary judgment opinion and repeated verbatim after trial, that "the uncontroverted evidence demonstrates * * * the legislators excluded many heavily-Democratic precincts from District 12, even when those precincts immediately border the Twelfth and would have established a far more compact district." J.S. App. 25a; see *id.* at 261a (summary judgment opinion). It is true that District 12 excludes a number of adjacent precincts with high Democratic registration; the district court enumerated those precincts in its opinion. See *id.* at 13a-14a; compare J.S. App. 249a-250a (summary judgment opinion). But, as this Court noted in *Hunt I*, the State's evidence "showed that, in North Carolina, party registration and party preference do not always correspond." 526 U.S. at 551. Indeed, the undisputed evidence showed that a large number of registered Democrats in North Carolina regularly vote Republican. See J.A. 397, 780; J.S. App. 173a-174a; 213a-225a.[5] Accordingly, the State asserted that it used actual election returns by precinct—not registration figures—to assess the partisan make-up of precincts and to construct its 1997 plan. The fact that District 12's boundaries sometimes omit precincts that are heavily Democratic by registration does nothing to disprove

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[5] For example, in 1996, 54% of the State's voters were registered as Democratic, while only 34% were Republicans. *The Almanac of American Politics 1998*, at 1056 (1997). Yet the Republican candidates won in the 1992 and 1996 presidential elections, the State's two Senators at the time of the redistricting were both Republicans (although a Democrat defeated one of them in the 1998 election), and the State's delegation to the 105th Congress consisted of six Republicans and six Democrats (although one of the Democratic seats was won by a Republican in the 1998 election). *Id.* at 1057.

the State's contention that its predominant motive was to create a solidly Democratic District 12, as measured by actual election returns.[6]

This Court stated in *Hunt I* that "[e]vidence that blacks constitute even a supermajority in one congressional district while amounting to less than a plurality in a neighboring district will not, by itself, suffice to prove that a jurisdiction was motivated by race in drawing its district lines when the evidence also shows a high correlation between race and party preference." *Hunt I*, 526 U.S. at 551-552. At bottom, the evidence repeated from the district court's former opinion did no more than show what this Court determined would "not suffice" to prove a racial motivation, much less a predominant racial motivation. Accordingly, the district court's conclusion in this part of the opinion that "where cities and counties are split between the Twelfth District and neighboring districts, the splits invariably occur along racial, rather than political, lines," J.S. App. 25a, must be rejected as unsupported by the evidence.[7]

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[6] There is an additional defect in the district court's inference, because the district court disregarded "the necessity of determining whether race predominated in the redistricters' actions *in light of what they had to work with*." *Bush*, 517 U.S. at 972 n.*. The fact that District 12 excludes even some adjacent precincts with Democratic voting patterns would be of little significance, unless it could be shown as well that including those precincts would make the District as a whole more Democratic. Where, for instance, the district lines tend to exclude precincts with Democratic tendencies while including precincts with more pronounced Democratic tendencies, the exclusion of the former casts no doubt on the State's claim that it was attempting to draw as highly a Democratic district as possible. The evidence in fact showed that this was precisely what happened here, whether measured by party registration or actual election returns. See Jt. Exhs. 107-109; see also J.A. 140 (testimony by Dr. Weber agreeing that excluded white precincts are not "as heavily Democratic" as the precincts within District 12.).

[7] The State supported its conclusion that the district was drawn along political lines by showing that Republican victories were common in precincts abutting District 12, see J.S. App. 213a- 225a, and that the splits in counties and municipalities divided Democratic portions in District 12 from Republican portions outside District 12, see *id.* at 189a, 191a-192a. The district court did not address that evidence.

B. It Was Clear Error For The District Court To Infer Predominant Racial Motive From Dr. Weber's Testimony

The district court added a brief additional portion to its prior opinion. See J.S. App. 26a-28a. That portion purports to address further the question whether race or partisan considerations was the predominant factor in drawing District 12. Some of the evidence to which the district court refers in this portion of its opinion is essentially repetitious of the evidence discussed above, and it is thus no more helpful in distinguishing between racial and partisan motivations underlying District 12. But the district court also relied on a number of portions of the testimony of Dr. Ronald Weber, appellees' expert, which the district court stated showed "time and again how race trumped party affiliation in the construction of the 12th District and how political explanations utterly failed to explain the composition of the district." J.S. App. 26a. That conclusion, however, was plainly wrong.

Initially, as discussed above, "party affiliation"—as opposed to actual partisan voting conduct—is of little relevance in this case and of no use in the analysis. See pp. 19-20, *infra*. It was therefore error to rely on portions of Dr. Weber's testimony that were based on registration data. Beyond that, however, the evidence presented by Dr. Weber on which the district court relied was not significantly probative of race as the predominant factor in drawing District 12. Accordingly, the court committed clear error in relying on that evidence.

1. The district court cited a portion of Dr. Weber's testimony in which he referred to the fact that District 12 has more Democratic voters than adjoining Democratic

District 8. He stated that the State, had it been following its partisan objectives, would have "want[ed] to take some of the voters in the district that you are drawing that's overly safe and put them into [an] adjacent district so as to make that district more competitive." Tr. 162 (J.A. 91).[8]

The State, however, explained the reason for this configuration. District 12, in general, is no more solidly partisan than are at least two Republican Districts—Districts 6 and 10. See J.S. App. 80a (election results). The proportion of Democrats in District 12 is therefore not suspect. And with respect to the specific line dividing Districts 12 and 8, the State explained that that line runs along the border between Cabarrus County (in District 8) and Mecklenburg County (in Districts 9 and 12). See J.A. 501 (map). To put some District 12 Democrats into District 8, the State would have had to violate two political constraints that were important to the legislature: it would have had to move some of Mecklenburg County into District 8, which would have divided the county into three districts and thus violated the State's consistent policy in the 1997 Plan of placing no county in more than two districts, see J.A. 179, 474-475, 780-782; see also J.A. 658; and it would likely have required moving some of Cabarrus County out of District 8 to District 12 in return, thus violating the desire of Democratic incumbent Hefner in District 8, who lived in Cabarrus County, to represent his entire home county, see J.S. App. 85a; J.A. 205-206.

The district court did not discuss the State's proffered explanation or otherwise explain why it might be deficient.[9] Dr.

[8] The district court referred to another portion of Dr. Weber's testimony, in which he made essentially the same point, when it stated that "Dr. Weber showed that, without fail, Democratic districts adjacent to District 12 yielded their minority areas to that district, retaining white Democratic precincts." J.S. App. 26a (citing Tr. 255-256 (J.A. 134-135)). The district court's misapprehension of the record is apparent from its references to "Democratic districts adjacent to District 12," since it is undisputed that, of the five districts adjacent to District 12, only one (District 8) had a Democratic incumbent in 1997. Moreover, the district court did not specify any majority-minority precincts that had been in District 8 in a prior plan and subsequently were "yielded" to District 12, and we are unable to identify any. As the map of District 12 and its surroundings reveals, see J.A. 483, there are no majority-minority precincts near the border between Districts 8 and 12.

[9] Under Rule 52(a) of the Federal Rules of Civil Procedure, a district court "shall find the facts specially and state separately its conclusions of law thereon." As this Court has stated, "there comes a point where findings become so sparse and conclusory as to give no revelation of what the District Court's concept of the determining facts and legal standard may be." *Commissioner* v. *Duberstein*, 363 U.S. 278, 292 (1960). The courts of appeals, led by the Fifth Circuit, have required that district courts exercise special care under Rule 52(a) in the redistricting context, and the district court's failure to exercise such care is itself grounds for reversal. As the Fifth Circuit has explained, "[b]ecause the resolution of a voting dilution claim requires close analysis of unusually complex factual patterns, and because the decision of such a case has the potential for serious interference with state functions," district courts must "strictly adhere[] to the [Rule] 52(a) requirements" that they "find the facts specially" and must "explain with particularity their reasoning and the subsidiary factual conclusions underlying their reasoning." *Westwego Citizens for Better Gov't* v. *City of Westwego*, 872 F.2d 1201, 1203 (1989) (quoting *Velasquez* v. *City of Abilene*, 725 F.2d 1017, 1020 (5th Cir. 1984)). Other courts of appeals similarly "require a particularly definite record for voting rights cases." *Cousin* v. *McWherter*, 46 F.3d 568, 574 (6th Cir. 1995); accord *Johnson* v. *Hamrick*, 196 F.3d 1216, 1223 (11th Cir. 1999); *Lee County Branch of the NAACP* v. *City of Opelika*, 748 F.2d 1473, 1480 (11th Cir. 1984); *Harvell* v. *Ladd*, 958 F.2d 226, 229 (8th Cir. 1992); *Buckanaga* v. *Sisseton Indep. Sch. Dist.*, 804 F.2d 469, 472 (8th Cir. 1986). The "bedrock rule" that a district court's findings must be "sufficiently detailed to permit a reviewing court to ascertain the factual core of, and the legal foundation for, the rulings below * * * has particular force in cases of this genre." *Uno* v. *City of Holyoke*, 72 F.3d 973, 988 (1st Cir. 1995). That includes the requirement that "the district court must discuss 'not only the evidence that supports its decision but also all the substantial evidence contrary to its opinion.'" *Ibid.*; see also *Velasquez*, 725 F.2d at 1021 (remanding for district court, which wrote a "long and detailed" opinion, to "take note of substantial contrary evidence presented by the appellants"). It also includes the requirement that "when the statistics are the principal evidence offered * * *, the district court must ensure that it thoroughly

Weber admitted that he did not take into account any of the political considerations advanced by the State. See J.A. 135 ("I don't know anything about what Congressman Hefner asked."), 136 (answering "No" to question whether he "inquired about any real world political issues that might have been going on that might have determined why the Legislature drew the line where it did"). Without some reason to discredit the State's explanation, Dr. Weber's analysis does not provide significant evidence of discrimination. Accordingly, the district court's inference of predominant racial motive from Dr. Weber's evidence was "illogical" and, hence, clearly erroneous. See *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 577 (1985).

2. The district court also relied on Dr. Weber's testimony that District 12 contains virtually all (76 out of 79) precincts that are 40% or more African-American in the six counties that comprise the district, but it does not contain as high a percentage of precincts with Democratic tendencies, even as measured by election results. Tr. 204-205 (J.A. 105-106). The district court clearly erred in inferring a racial motive—much less a predominant racial motive—from that testimony. The question is not whether there were other precincts in the six counties with Democratic voting patterns that were left out of District 12; the question is whether, if there are such precincts, including them in District 12 would have raised or lowered the overall likely Democratic vote in District 12. If the omitted Democratic precincts are far from the borders of District 12, including them would frequently not have been practical, and, even if it would, expanding the district to include them could easily have required including or excluding other precincts that would have resulted in an

discusses its reasons for rejecting that evidence." *Clark* v. *Calhoun County*, 21 F.3d 92, 96 (5th Cir. 1994).

overall boost in Republican strength in District 12.[10] Dr. Weber, however, did not attempt to show that the omitted precincts could have reasonably been included in District 12 or that their inclusion would have in fact raised Democratic strength in the district. Cf. J.S. App. 50a n.21 (Thornburg, J., dissenting) (State's evidence showed that "few of the strong Democratic precincts to which Dr. Weber referred could have easily been included in the Twelfth District"). Without such evidence, Dr. Weber's testimony on this point proves nothing.[11]

3. The district court also relied on page 221 of Dr. Weber's testimony (J.A. 111) in which he argued that splitting a single precinct in Mecklenburg County (Precinct 77, the only split precinct in District 12, see J.S. App. 84a) showed that race was the predominant motive. The State explained that the purpose of splitting that precinct, located at the southernmost tip of Mecklenburg County, was to connect the two portions of Republican Representative Myrick's district without including additional Democratic voters in her district. See J.S. App. 208a; J.A. 20, 617-618. That in turn was in service of the overall goal of protecting incumbents and therefore splitting Mecklenburg County between the two incumbents who lived there—the Democratic incumbent in District 12 and the Republican incumbent in District 9. See J.A. 597-598. Neither the court nor Dr. Weber ad-

[10] Insofar as Dr. Weber referred to precincts with Democratic voting patterns adjoining District 12, the evidence showed that those precincts were uniformly *less* Democratic than the precincts included in the district. See p. 20 n.6, *supra*.

[11] The district court also referred to pages 262 (J.A. 139-140) and 288 (J.A. 156-157) of the transcript. In those portions of his testimony, Dr. Weber was being cross-examined regarding his claim that Democratic precincts were left out of District 12. His testimony on cross-examination adds nothing to the analysis. At page 251 of the transcript (J.A. 131), Dr. Weber simply states the conclusion that "[r]ace is the predomina[n]t[] factor." That too adds nothing to the analysis.

dressed that explanation. Although evidence of a single split precinct is unlikely to be significantly probative in any event, the failure by Dr. Weber or the court to explain why the State's explanation was deficient undermines the court's reliance on this testimony to infer predominant motive. See n. 9, *supra*.

4. Taken individually or together, none of the portions of Dr. Weber's testimony on which the district court relied were significantly probative even of race as *a* factor in drawing District 12. Moreover, even if it were otherwise and Dr. Weber's testimony on these points were significantly probative that race was *a* factor in drawing District 12, neither a slight increase in the percentage of Democrats in District 12, a failure to include some isolated Democratic precincts, nor the splitting of a single precinct would suffice to show that race was the *predominant* factor. The district court committed clear error in finding Dr. Weber's testimony sufficient to support an inference that the State's predominant motive in drawing District 12 was race.

C. The District Court's Conclusions From Other Testimony Were Infected By Its Earlier Errors And In Any Event Confuse Evidence That Race Was *A* Factor In Drawing District 12 With Evidence That It Was The *Predominant* Factor

1. The district court stated that "[t]he conclusion that race predominated was further bolstered by Senator Cooper's allusion to a need for 'racial and partisan balance'" in a statement made to the state House Committee on Congressional Redistricting. J.S. App. 27a. At trial, Senator Cooper testified that by "partisan balance," he meant "[k]eeping the 6-6 split," and by "racial balance," he meant "that African Americans would have a fair shot to win both the First and 12th Districts, and I think that's racially fair." J.A. 222. The district court stated, however, that "[t]he Senator's contention that although he used the term 'partisan balance' to refer to the maintenance of a six-six

Democrat-Republican split in the congressional delegation, he did not mean the term 'racial balance' to refer to the maintenance of a ten-two balance between whites and African-Americans is simply not credible." J.S. App. 27a.

When the district court made that credibility finding regarding Senator Cooper's testimony, it had already made the errors recounted above in determining that the statistical and demographic evidence in the case supported an inference of race as the predominant motive. The district court was no doubt influenced by those erroneous conclusions in determining that Senator Cooper's contrary testimony was not credible. Moreover, the district court's inference that because "partisan balance" meant a six-six split, "racial balance" must have also meant a fixed numerical split, is belied by the fact that Senator Cooper's original testimony did not merely refer to "partisan and racial balance," see J.S. App. 27a, but to "*geographic*, racial and partisan balance," J.A. 460 (emphasis added). Because the term "geographic balance" does not suggest the kind of division into neat numerical categories that the term "partisan balance" does, it is apparent that Senator Cooper did not consistently mean by "balance" a fixed numerical division of the districts, as the district court apparently believed.

For the above reasons, the district court's credibility finding regarding Senator Cooper is unsupported. Even if the district court's finding were accepted, however, it would show at most that race was *a* motivation in Senator Cooper's attempt to configure District 12. He had already testified, however, that "we did pay attention to race," and that "[t]hat was one of the factors that was considered," but that "it was certainly not the predomina[nt] factor." J.A. 222. The question in the case thus was never whether race was considered, but whether race was the *predominant factor*. Neither Senator Cooper's statement that he was seeking "geographic, racial and partisan balance," nor his asserted failure to explain what he meant by "racial balance" suggests

that racial balance was the *predominant* motive underlying the creation of District 12—that "[r]ace was the criterion that, in the State's view, could not be compromised." *Shaw II*, 517 U.S. at 907.

2. Finally, the district court relied on the Cooper-Cohen e-mail, in which Gerry Cohen, the legislative employee responsible for actually drawing the 1997 Plan on the computer, had said "I [Cohen] have moved Greensboro Black community into the 12th, and now need to take [a]bout 60,000 out of the 12th. I await your direction on this." J.S. App. 8a; see J.A. 369 (full text of e-mail). Cohen's e-mail on its face merely identified the general characteristics of the community that had been moved into District 12 by referring to its racial composition—which, as this Court has noted, "the legislature always is *aware* of * * * when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors." *Shaw I*, 509 U.S. at 646; see also *Bush*, 517 U.S. at 958 ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race."). Accordingly, the question presented by the e-mail is whether the district court properly inferred from that awareness that "the chief architects of the 1997 Plan had evolved a methodology for segregating voters by race, and that they had applied this method to the 12th District." J.S. App. 27a.

As with the Cooper statement, the district court made its inference with respect to the e-mail only after having made its erroneous findings that the statistical and demographic evidence demonstrated a predominant racial motive. Had the district court not made the earlier errors, it might have seen the e-mail in a different light, and it might not have drawn the dramatic conclusion from the e-mail that it did. Indeed, the State had explained that the reason for moving the community into District 12 was in part to avoid splitting Guilford County into three districts—a goal that, as noted above, see p. 23, *supra*, the State followed consistently with

respect to every county in the State in the 1997 Plan—and in part to bolster the Democratic vote in District 12 (a goal desired by the Democratic state Senate and Congressman Watt, the incumbent there) and to subtract Democrats from the vote in neighboring District 6 (a goal desired by Republican Congressman Coble, the incumbent there). See J.A. 192, 193, 195-196, 216, 264-265, 268. The district court did not specifically address or assess the State's evidence that these were the primary motivations for moving the portion of Greensboro into the Twelfth District. See n. 9, *supra*. Without an explanation of the district court's reasons for rejecting the State's proffered explanation, the district court's conclusion from the e-mail is insupportable.

Finally, even if the e-mail were viewed as persuasive evidence that race was *a* factor in moving that portion of Greensboro into District 12, it would not provide sufficient evidence to infer that race was the *predominant* factor in constructing District 12 as a whole. In this respect, again, *Bush* is instructive. In that case, the plurality noted evidence that "the decision to create the districts now challenged as majority-minority districts was made at the outset of the process and never seriously questioned," 517 U.S. at 961, and that those drawing the challenged districts made use of "uniquely detailed racial data," *id.* at 961-962. Nonetheless, the plurality viewed that evidence merely as setting forth the question whether race or politics predominated in drawing the challenged districts, not as providing an answer for that question. Similarly here, even scattered evidence that race was a factor taken into account in determining one or another particular feature of District 12 is insufficient to show that race was the predominant motive underlying District 12 as a whole.

3. As is apparent from a review of the district court's opinion, the court erred in concluding that race was the predominant motive in the creation of District 12. To a significant extent, the court relied on evidence that could not

resolve the central question before the court: whether race or politics predominated in the construction of District 12. Even insofar as the district court, however, relied on evidence that had to do with racial considerations, the evidence showed at most that race was taken into account in creating District 12—a fact that the State conceded from the beginning. Because the district court failed correctly to appreciate and apply the difference between race as *a* factor and race as the *predominant* factor, the district court's conclusion that District 12 is an unconstitutional racial gerrymander cannot stand. To permit a district court to find a predominant racial motive in a case like this would put state legislatures that have acted entirely constitutionally at risk that a district court, finding that race was a factor in one or another feature of a districting plan, could declare the entire plan unconstitutional. That would threaten to immerse the district courts deeply in the highly political thicket of redistricting, and it cannot be squared with the kind of sensitivity toward state legislative efforts in this field that this Court has always required.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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